

Superior Court of Justice

(Name of court)

Court File Number

FS-11-367893

at **393 University Avenue, 10<sup>th</sup> floor, Toronto, Ontario, M5G 1E6**  
Court office address

Form 10: Answer

**Applicant(s)**

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

**V. [REDACTED]**  
[REDACTED]  
[REDACTED]  
**L. [REDACTED]**  
[REDACTED]  
[REDACTED]

Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

**Martha McCarthy**  
**Martha McCarthy & Company**  
**146 Danenport Road**  
**Toronto, ON M5R 1J2**  
  
**Tel: 416-862-6226**  
**Fax: 416-662-9001**  
**martha@mccarthyco.ca**

**Respondent(s)**

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

**Attorney General of Canada**

Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

**Sean Gaudet**  
**Senior Counsel**  
**The Exchange Tower**  
**130 King Street West, Suite 3400**  
**Toronto, Ontario M5X 1K6**  
  
**Tel: (416) 973-0392**  
**Fax: (416) 952-4518**  
**E-mail: sean.gaudet@justice.gc.ca**

Name & address of Children's Lawyer's agent for service (street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any)) and name of person represented.

**INSTRUCTIONS: Financial Statement**

**COMPLETE A FINANCIAL STATEMENT (Form 13) IF:**

- you are making or responding to a claim for spousal support; or
- you are responding to a claim for child support; or
- you are making a claim for child support in an amount different from the table amount specified under the Child Support Guidelines.

You must complete all parts of the form **UNLESS** you are **ONLY** responding to a claim for child support in the table amount specified under the Child Support Guidelines **AND** you agree with the claim. In that case, only complete Parts 1, 2 and 3.

**COMPLETE A FINANCIAL STATEMENT (Form 13.1) IF:**

- you are making or responding to a claim for property or exclusive possession of the matrimonial home and its contents; or
- you are making or responding to a claim for property or exclusive possession of the matrimonial home and its contents together with other claims for relief.

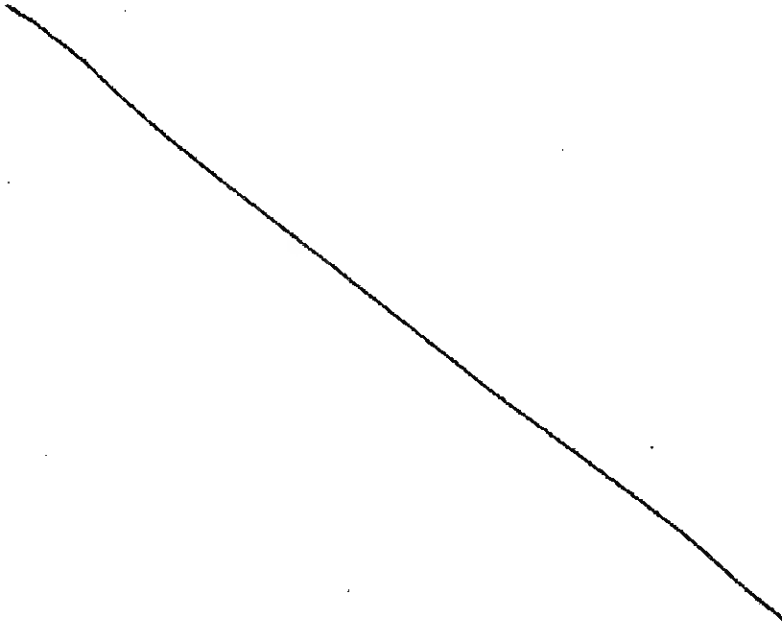
**TO THE APPLICANT(S):**

If you are making a claim against someone who is not an applicant, insert the person's name and address here.

**AND TO:** *(full legal name)* \_\_\_\_\_ **an added respondent,**  
**of** *(address of added party)* \_\_\_\_\_  
**My name is** *(full legal name)* \_\_\_\_\_

1. I agree with the following claim(s) made by the applicant: *(Refer to the numbers alongside the boxes on page 4 of the application form.)*  
**None**

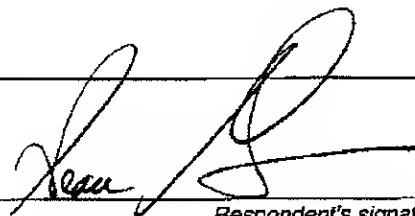
2. I do not agree with the following claim(s) made by the applicant: (Again, refer to the numbers alongside the boxes on page 4 of the application form.)  
00 - a divorce  
30 - costs
3. ☒ I am asking that the applicant's claim (except for the parts with which I agree) be dismissed with costs.
4. ☐ I am making a claim of my own.  
(Attach a "Claim by Respondent" page and include it as page 3. Otherwise, do not attach it.)
5. ☐ The FAMILY HISTORY, as set out in the application ☐ is correct.  
☐ is not correct.  
(If it is not correct, attach your own FAMILY HISTORY page and underline those parts that are different from the applicant's version.)
6. The important facts that form the legal basis for my position in paragraph 2 are as follows:  
(In numbered paragraphs, set out the facts for your position. Attach an additional sheet and number it if you need more space.)
1. See attached Schedule A



Put a line through any blank space left on this page

June 17, 2011

Date of signature



Respondent's signature

**CLAIM BY RESPONDENT**

Fill out a separate claim page for each person against whom you are making your claim(s).

**7. THIS CLAIM IS MADE AGAINST**

- ☐ THE APPLICANT
- ☐ AN ADDED PARTY, whose name is: (full legal name) \_\_\_\_\_  
(If your claim is against an added party, make sure that this person's name appears on page 1 of this form.)

**8. I ASK THE COURT FOR THE FOLLOWING:**

(Claims below include claims for temporary orders.)

Claims under the Divorce Act (Check boxes in this column only if you are asking for a divorce and your case is in the Superior Court of Justice or Family Court of the Superior Court of Justice.)		Claims relating to property (Check boxes in this column only if your case is in the Superior Court of Justice or Family Court of the Superior Court of Justice.)		Claims relating to child protection	
00 <input type="checkbox"/> a divorce	20 <input type="checkbox"/> equalization of net family properties	40 <input type="checkbox"/> access			
01 <input type="checkbox"/> support for me	21 <input type="checkbox"/> exclusive possession of matrimonial home	41 <input type="checkbox"/> lesser protection order			
02 <input type="checkbox"/> support for child(ren)-table amount	22 <input type="checkbox"/> exclusive possession of contents of matrimonial home	42 <input type="checkbox"/> return of child(ren) to my care			
03 <input type="checkbox"/> support for child(ren)-other than table amount	23 <input type="checkbox"/> freezing assets	43 <input type="checkbox"/> place child(ren) into care of (name) _____			
04 <input type="checkbox"/> custody of child(ren)	24 <input type="checkbox"/> sale of family property	44 <input type="checkbox"/> children's aid society wardship for _____ months			
05 <input type="checkbox"/> access to child(ren)		45 <input type="checkbox"/> society supervision of my child(ren)			
<b>Claims under the Family Law Act or Children's Law Reform Act</b>		<b>Other claims</b>			
10 <input type="checkbox"/> support for me	30 <input type="checkbox"/> costs				
11 <input type="checkbox"/> support for child(ren)-table amount	31 <input type="checkbox"/> annulment of marriage				
12 <input type="checkbox"/> support for child(ren)-other than table amount	32 <input type="checkbox"/> prejudgment interest				
13 <input type="checkbox"/> custody of child(ren)					
14 <input type="checkbox"/> access to child(ren)					
15 <input type="checkbox"/> restraining/non-harassment order					
16 <input type="checkbox"/> indexing spousal support					
17 <input type="checkbox"/> declaration of parentage					
18 <input type="checkbox"/> guardianship over child's property					
50 <input type="checkbox"/> Other (Specify.) _____					

Give details of the order that you want the court to make. (Include any amounts of support (if known) and the name(s) of the child(ren) for whom support, custody or access is claimed.)

**IMPORTANT FACTS SUPPORTING MY CLAIM(S)**

(In numbered paragraphs, set out the facts that form the legal basis for your claim(s). Attach an additional page and number it if you need more space.)

Put a line through any blank space left on this page.

June 17, 2011

Date of signature

[Redacted Signature]

Respondent's signature

**LAWYER'S CERTIFICATE**

For divorce cases only

My name is **Sean Gaudet**

and I am the respondent's lawyer in this divorce case. I certify that I have complied with the requirements of section 9 of the *Divorce Act*.

June 17, 2011

Date

Signature of Lawyer

### **Schedule A to Answer of the Attorney General**

1. The Attorney General of Canada opposes all of the relief requested by the Joint Applicants set out in paragraphs 1 to 10 of the Joint Application for Divorce. Moreover, even were the Court to grant all of the relief requested in paragraphs 2 to 10 of the Joint Application for Divorce, the court would not have the jurisdiction to grant a divorce to a couple who are not legally married.

2. The Attorney General's position in respect of the issues raised by the Joint Applicants is as follows:

- (a) The Superior Court does not have the jurisdiction to grant the Joint Applicants a divorce because, under principles of private international law that apply in Canada, the Joint Applicants are not legally married under Canadian law;
- (b) In the alternative, granting a divorce to the Applicants would not be a proper exercise of the Superior Court's inherent *parens patriae* jurisdiction;
- (c) In the further alternative, the Joint Applicants lack the requisite standing to challenge the constitutional validity of the one-year residency requirement set out in sections 2(1) and 3(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.);

- (d) In the yet further alternative, the one-year residency requirement set out in sections 2(1) and 3(1) of the *Divorce Act* is constitutionally valid;

3. The Attorney General opposes the bifurcation of this proceeding in the manner suggested by the Joint Applicants in paragraph 8 of the Joint Application for Divorce, namely by having the Court first address the claim for a divorce pursuant to the Court's *parens patriae* power by motion, with the balance of the issues proceeding if the Joint Applicants' motion is not successful. Rather, the Attorney General submits that the Court should first address the jurisdictional issue raised in paragraph 1(a) above by way of motion. If the Attorney General's motion does not succeed, the balance of the application should then proceed on the balance of the outstanding issues.

**(a) The Superior Court has no jurisdiction to grant a divorce to the Joint Applicants because they are not legally married under Canadian law.**

4. In order for a marriage to be legally valid under Canadian law, the parties to the marriage must satisfy both the requirements of the law of the place where the marriage is celebrated (the *lex loci celebrationis*) with regard to the formal requirements, and the requirements of the law of domicile of the couple with regard to their legal capacity to marry one another.

5. In this case, neither party had the legal capacity to marry a person of the same sex under the laws of their respective domicile - Florida and the United Kingdom. As a result, their marriage is not legally valid under Canadian law.

6. Not being legally married to each other, the Joint Applicants are not “spouses” within the meaning of the *Divorce Act*, and the Court has no jurisdiction to grant them a divorce as it is not legally possible to end a marriage that was void *ab initio*.

**(b) In the alternative, this is not an appropriate case for the Court to exercise its inherent *parens patriae* jurisdiction.**

7. The *parens patriae* jurisdiction is founded on necessity, namely the need to act for the protection of those who cannot care for themselves (*Re Eve*, [1986] 2 S.C.R. 388).

8. The court’s inherent *parens patriae* jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap (*A.A. v. B.B* (2007), 83 OR (3d) 561 at para 27).

9. The Joint Applicants do not fall within the category of persons with respect to whom the Court’s inherent *parens patriae* jurisdiction has previously been exercised, i.e. children in danger or persons who need protection who cannot care for themselves. The *parens patriae* jurisdiction should not be extended to gay and lesbian couples who do not meet the residency requirement set out in the *Divorce Act*.

10. There is no legislative gap in the *Divorce Act* that justifies the exercise of the Superior Court’s inherent *parens patriae* jurisdiction. Parliament has put in place a one-year residency requirement that applies to all married couples. The fact that the Joint Applicants do not satisfy this requirement and are not in a legally valid marriage does not mean that there is a gap in the legislation. Other remedies are open to them to clarify their marital status under their respective laws of domicile.



**(c) In the further alternative, the Joint Applicants lack the standing to challenge the constitutionality of sections 2(1) and 3(1) of the *Divorce Act*.**

11. The Joint Applicants lack the standing to challenge sections 2(1) and 3(1) of the *Divorce Act* since they are not directly affected by these provisions. Their inability to obtain a divorce is as a result of the legal regimes of their respective domiciles - Florida and the United Kingdom, which do not grant them the legal capacity to marry of person of the same sex.

12. The ultimate relief that the Joint Applicants seek – a divorce – would ordinarily be sought from and granted by courts of competent jurisdiction in their respective domiciles, but for the fact that these jurisdictions do not recognize the couple as being parties to a legally valid marriage. The Applicants are not without recourse, however, as they can seek orders of nullity from courts of competent jurisdiction in their respective domiciles, because their marriage was void *ab initio*, as a result of the operation of the laws of those respective countries..

**(d) In the yet further alternative, the one-year residency requirement set out in section 3(1) of the *Divorce Act* is constitutionally valid legislation.**

13. The one-year residency requirement set out in the impugned provisions of the *Divorce Act* violates neither s. 15(1) nor s. 7 of the *Charter*.

14. The one-year residency requirement does not violate s. 15(1) of the *Charter*. It applies to any person seeking a divorce from a superior court in Canada. It is facially non-discriminatory. Nor does it have a discriminatory effect on gay or lesbian couples, as any gay or lesbian couple in a legally valid marriage, whether contracted in Canada

or elsewhere, who meets the requirements of jurisdiction set out in section 3(1) may obtain a divorce in Canada pursuant to the *Divorce Act*. It applies to all married persons seeking a divorce, regardless of sexual orientation.

15. The liberty interest in s. 7 is engaged when state compulsions or prohibitions affect fundamental life choices (*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307). Even if it could be demonstrated that this includes the right of Canadian residents to choose to end a marriage through divorce, it does not encompass a right to obtain a divorce from a court in a jurisdiction in which the applicants are not resident.

16. Alternatively, the imposition of a one-year residency requirement is consistent with the principles of fundamental justice.

17. In the further alternative, if the one-year residency requirement set out in the *Divorce Act* is found to be in violation of section 15(1) and/or s. 7 of the *Charter*, it is a justifiable infringement under section 1 of the *Charter*.

### **Costs**

18. The Attorney General does not seek an award of costs for responding to this application.